

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
(December 14, 2000 Session)

**ARGONAUT INSURANCE COMPANY, as workers' compensation
carrier of G.U.B.M.K. Constructors v. BOBBY E. STILES v. JIM
FARMER, Director of the Division of Worker's Compensation, Tennessee
Department of Labor**

**Direct Appeal from the Circuit Court for Blount County
No. L-11691 W. Dale Young, Circuit Judge**

**No. E2000-01092-WC-R3-CV - Mailed - September 5, 20001
Filed - October 9, 2001**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The employee appeals an award of twenty percent permanent partial disability as inadequate. We modify the award.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Blount County Circuit Court Modified and Remanded.

HOWELL N. PEOPLES, SP. J., delivered the opinion of the court, in which WILLIAM M. BARKER, JUSTICE, and JOHN K. BYERS, SR. J., joined.

J. Bartlett Quinn, Chattanooga, Tennessee, for the Appellant Bobby E. Stiles

E. Blaine Sprouse, Nashville, Tennessee, for the Appellee Jim Farmer, Director of Division of Worker's Compensation, Tennessee Department of Labor.

MEMORANDUM OPINION

FACTS

Plaintiff Argonaut Insurance Company (Argonaut) brought this declaratory judgment action against Defendant Bobby E. Stiles (Stiles) to determine its liability to Stiles under the Tennessee Workers' Compensation Act for a May 1998 injury. Argonaut is the workers' compensation insurer for G.U.B.M.K Constructors. Stiles then filed a counter-complaint against Argonaut and Jim Farmer, Director of the Division of Workers' Compensation, Tennessee Department of Labor (Second Injury Fund).

Stiles was born January 1, 1941 and attended elementary school through the fifth grade. His work history consists of numerous positions as an unskilled manual laborer. In 1980, Stiles was injured while working as a miner. Due to this injury, Stiles filed a workers' compensation action, which was settled with Stiles receiving an award of 90.9 percent disability to the body as a whole.

On December 2, 1999, this case came to trial before the Circuit Court for Blount County. The trial consisted of the testimony of three witnesses, Stiles, Ms. Dorothy Edwards¹, a vocational expert, and Lester F. Littell, III, M.D., Stiles' authorized treating physician, who testified by deposition.

Stiles testified that besides the 1980 and 1998 injuries, he also suffered a 1995 injury to his lower back which required surgery. He testified that although the 1995 injury was work-related, he did not notify Argonaut or G.U.B.M.K of this injury.

In describing the effects of the 1998 injury, Stiles testified that he suffers from neck pain, headaches, and numbness in his right arm and hand. Additionally, Stiles testified that these symptoms were not present before the 1998 injury. As an example of his changed circumstance, Stiles testified that mowing his yard with the assistance of a riding lawn mower used to take him less than two hours but now takes all day. His daughters do his housework, and he takes his meals with his daughters or his brother, who lives nearby. He stated he has trouble driving long distances – 20 to 30 miles. This testimony was uncontroverted.

Ms. Edwards testified that due to his age, education, and physical restrictions, Stiles was 100 percent vocationally disabled with no access to the labor market. She also testified that Stiles has no transferable job skills. No other expert evidence was offered on the issue of vocational disability.

Dr. Littell assessed Stiles as having a 15 percent medical disability to the body as a whole resulting from the 1998 injury. Dr. Littell also testified that Stiles has the following permanent medical restrictions:

- 1) Able to sit for only 15 minutes at a time;
- 2) Able to stand/walk for only 20 minutes at a time;

¹ Incorrectly identified as "Ms. Morris" in the trial judge's memorandum of March 15, 2000, though this error was corrected in the Judgment entered April 28, 2000.

- 3) Able to sit for less than 2 hours per 8 hour workday;
- 4) Able to stand/walk for less than 2 hours per 8 hour workday;
- 5) Must be able to take a 10-15 minute break every hour of an 8-hour workday;
- 6) Completely unable to lift and carry weights of even less than 10 pounds as part of a competitive work situation; and
- 7) Unable to use his hands, fingers, or arms in any repetitive activity.

Noting that the pain Stiles suffers makes it hard for him to be involved in any job that requires endurance or physical activity, Dr. Littell testified:

“You know, I’m not a vocational expert; but, you know, he’s basically an uneducated laborer and no transferable skills, so I think it would be – mostly anything he would have to do would require physical activity, and I don’t think he can do much physical activity.”

The trial judge found that on May 18, 1998, Stiles suffered a compensable injury constituting an additional 20 percent permanent impairment to the body as a whole.

STANDARD OF REVIEW

The extent of vocational disability is a question of fact to be determined from all of the evidence, including lay and expert testimony. Nelson v. Wal-Mart Stores, Inc., 8 S.W.3d 625, 628 (Tenn. 1999); Worthington v. Modine Mfg. Co., 798 S.W.2d 232, 234 (Tenn. 1990). Our review of the trial court's finding in this case is de novo upon the record, "accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. Code Ann. §50-6-225(e)(2) (1999). We are obliged to review the record on our own to determine where the preponderance of the evidence lies. Ivey v. Trans Global Gas & Oil, 3 S.W.3d 441, 446 (Tenn. 1999); Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 456 (Tenn. 1988). Although deference must be given to the trial judge when issues of credibility and weight of oral testimony are involved, Seals v. England/Corsair Upholstery Mfg. Co., 984 S.W.2d 912, 915 (Tenn. 1999); Jones v. Hartford Accident & Indem. Co., 811 S.W.2d 516, 521 (Tenn. 1991), this Court is able to make its own independent assessment of the medical proof when the medical testimony is presented by deposition. Cooper v. INA, 884 S.W.2d 446, 451 (Tenn. 1994); Landers v. Fireman’s Fund Ins. Co., 775 S.W.2d 355, 356 (Tenn. 1989).

DISCUSSION

A medical impairment rating does not equal a vocational disability rating. Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 774 (Tenn. 2000). A vocational disability rating incorporates the medical limitations of the employee, as well as the employee’s skills and training, education, age, and local job opportunities. Id. A vocational disability “must focus on the employee’s ability to return to employment.” Id. citing Davis v. Reagan, 951 S.W.2d 766, 767 (Tenn. 1997). While the medical disability rating assigned by a medical doctor is

one of the relevant factors, the employee's own assessment of his ability to return to work should also be considered. Id.

Stiles was 59 years of age at the time of trial. He has no transferable job skills, as his work history is limited to unskilled manual labor jobs. He is functionally illiterate. Given these facts, the nature of the permanent medical restrictions set by Dr. Littell, the opinion of the vocational expert, and Stiles own description of his inability to return to work, the preponderance of the evidence establishes that Stiles is permanently and totally disabled.

CONCLUSION

Based on a de novo review of the record, the preponderance of the evidence does not support the trial court's finding that the appellant is 20 percent permanently and partially disabled. Rather, the preponderance of the evidence establishes that the appellant is permanently and totally disabled. This case is remanded to the Blount County Circuit Court for enforcement of the judgment as modified by this Court. Costs of this appeal are assessed to the appellee, Jim Farmer, Director of Division of Workers' Compensation, Tennessee Department of Labor, for which execution shall issue, if necessary.

Howell N. Peoples

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JUDGMENT

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference;

Whereupon, it appears to the Court that the memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

Costs on appeal are taxed to the appellee, Jim Farmer, Director of Division of Workers' Compensation, Tennessee Department of Labor.

10/09/01